IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable E. Thomas Fitzgerald, Janet T. Neff, and Helene N. White

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ALBERTA STUDIER, PATRICIA M. SANOCKI, MARY A. NICHOLS, LAVIVA M. CABAY, MARY L. WOODRING, and MILDRED E. WEDELL,

Plaintiffs-Appellants,

vs.

MICHIGAN PUBLIC SCHOOL EMPLOYEES RETIREMENT BOARD, MICHIGAN PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET, and TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellees.

Supreme Court
Docket No. 125765

Court of Appeals
Docket No. 243796

Ingham County Circuit Court
Case No. 00-92435-AZ

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REPLY BRIEF—APPELLANTS'

* * ***ORAL ARGUMENT REQUESTED*** * *

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INTRODUCTION

This is Plaintiffs-Appellants' Reply Brief in Docket No. 125765. By Court Rule, this Brief is limited to ten pages so Plaintiffs-Appellants will not reiterate their arguments made in previous Briefs but will instead focus on the arguments and cases raised by Defendants-Appellees in their Brief.

I. THE HEALTH BENEFITS PROVIDED TO MPSERS RETIREES ARE PROTECTED FROM DIMINISHMENT AND IMPAIRMENT BY MICH CONST, 1963, ART 9, §24.

Defendants-Appellees begin by noting that an "individual's condition is not static." (Defendants-Appellees' Brief, p 7.) However, neither is the law. Defendants-Appellees go to great lengths throughout their Brief to establish that health benefits were not in existence at the time Mich Const 1963, art 9, §24 was adopted. Defendants-Appellees erroneously interpret the statutory construction rule of Soap and Detergent Ass'n v NRC, 415 Mich 728; 330 NW2d 346 (1982). That rule states, in relevant part:

> First, the interpretation given the constitution should be "the sense most obvious to the common understanding"; the one which "reasonable minds, the great mass of people themselves, would give it" [citations omitted]. (*Id*, p 745.)

Defendants-Appellees conclude this to mean the interpretation the great mass of people would give it at the time of the drafting of the language. There is no reason to believe that the "great mass" of people who voted to adopt the 1963 Constitution intended the language of art 9, §24 to mean anything other than what the drafters of that language stated it meant. This is particularly sound reasoning where, as in art 9, §24, the wording is legalistic in nature and was intended by the drafters to have a specific meaning. The drafters used the broad, all-encompassing words "financial benefits," not the limiting words "pension benefits."

Defendants-Appellees cite to Advisory Opinion Re: Constitutionality of 1972 PA 258, 389 Mich 659; 209 NW2d 200 (1973), for the proposition that an increase of $84 caused by the Act in question did not subvert art 9, §24. However, that case dealt with an increase in the contribution to the pension plan by current employees, not an increase in health care costs shifted to retirees.

Similarly, other cases relied upon by Defendants-Appellees are easily distinguishable on their facts. Tyler v Livonia Public Schools, 459 Mich 382; 590 NW2d 560 (1990), was a workers' compensation case and Jurva v Attorney General, 419 Mich 209; 351 NW2d 813 (1984), was a case that dealt with early retirement incentive plans. Finally, Port Huron Area School Dist v Port Huron Ed Ass'n, 120 Mich App 112; 327 NW2d 413 (1982), dealt with the issue of the meaning of the term "financial resources" in the context of a collective bargaining agreement, which is a completely different setting than the constitutional interpretation of the term "accrued financial benefits."

Defendants-Appellees also attempt to establish that health benefits are not "accrued financial benefits" by examining the dictionary definitions of the constitutional terms. If the Court wishes to examine definitional evidence, the case of Archer v Comm'r of Revenue of Kentucky, 312 KY 454; 227 SW2d 1001 (1950), may be illuminating. In that case, spousal taxpayers challenged the assessment of additional income taxes against them. Quoting *The Law of Federal Income Taxation*, the Court stated:

> The word "accrued" does not signify that an item is due in the sense of being payable; the accrual system disregards dates of payment, making the right to receive and not actual receipt decisive.

> The basic consideration in determining whether or not income has accrued depends upon whether or not all of the events creating the liability have occurred. (*Id*, p 456.)

See also Orlando Orange Groves Co v Hale, 119 Fla 159; 161 So 284 (1935); Jennings v Hayes, 787 SW2d 1 (1989); Watkins v Illinois Central Railroad Co, 232 F 691 (6th Cir. 1916).

Here, all of the events creating the liability have occurred. Namely, Plaintiffs-Appellants and their fellow retirees worked for many years, retired, and thus were vested in terms of health insurance. Therefore, Defendants-Appellees' accrued liability was triggered.

Defendants-Appellees also attempt to use the definition of "financial" to conclude that the health benefits in question are not included in that definition. They go so far as to say that "it is impracticable to define an accrued health benefit" (Defendants-Appellees' Brief, p 15), yet they are able to attach a monetary figure of $370,000,000 as the cost of retiree health care for 2000. (*Id*, p 2.) Defendants-Appellees absurdly argue that something that cost them $370,000,000 in 2000 is not a "financial" benefit. Their failure to acknowledge this inherent flaw in their logic undermines their entire argument on this issue.

II. DEFENDANTS-APPELLEES' CHANGES TO THE HEALTH INSURANCE WAS VIOLATIVE OF MICH CONST 1963, ART 1, §10 AND US CONST, ART I, §10.

The three-tier analysis under Mich Const 1963, art 1, §10 and US Const, art I, §10 has been clear throughout the Briefs to this Court. First, it must be determined whether a contractual relationship exists. This tier is the focus of Supreme Court Docket No. 125766. Second, it must be determined whether Defendants-Appellees' actions constituted a significant impairment of that relationship. Third, a significant

impairment may be permissible if Defendants-Appellees can demonstrate that the impairment was both reasonable and necessary to serve an important public purpose.

Defendants-Appellees' Brief claims that the increased cost to the retirees is reasonable. (Defendants-Appellees' Brief, p 36.) However, this is a highly factual question better suited to be resolved via full discovery and a trial. Factors to be weighed on the reasonableness of the impairment include the retirees' fixed incomes and the numerous medications they are required to have.

Defendants-Appellees also attempt to convince this Court of the reasonableness of the impairments because "they facilitate the public purpose of preventing the erosion of school funds and constitute a reasonable response to increasing health care costs" (*Id*), and "if there was no sharing of the increases in costs, the costs to MPSERS would become overwhelming." (*Id*, p 37.) How can this be if health benefits are not "financial," as Defendants-Appellees claim just pages earlier in their Brief? Again, this inherent flaw in their arguments undermines their impact.

Additionally, there is absolutely no evidence on the record as to Defendants-Appellees' claims of potential financial ruination to school districts. The issue of reasonableness and necessity is highly factual in nature and requires additional discovery before a trial.

III. GENUINE ISSUES OF MATERIAL FACT EXIST WHICH REQUIRE A TRIAL.

Defendants-Appellees close their Brief by attacking Plaintiffs-Appellants' experts' affidavits which support the conclusion that there was a significant impairment of the contractual relationship.

Most notably, Defendants-Appellees state that some of the affidavits compare the plan for active members to that provided to retirees and claim that such a comparison has no relevance. This is blatantly untrue, as at the time those affidavits were submitted, the parties were expressly directed by the Trial Court to conduct just such a comparison. (*See* Plaintiffs-Appellants' Appendix, p 203a.)

More incredibly, Defendants-Appellees allege that the actuarial affidavits are based on estimates and contradict each other. (Defendants-Appellees' Brief, pp 46 47.) Regarding the first allegation, it is hard to take Defendants-Appellees seriously when they themselves relied so heavily on figures from their "Exhibit K" which they admit was preliminary and incomplete. (*See* Exhibit K, Plaintiffs-Appellants' Appendix, p 548a.) This "preliminary" exhibit is the same one relied upon by the Trial Court in granting Defendants-Appellees' Motion for Summary Disposition. If the Trial Court can base its decision on preliminary data, then it could also consider the well-informed and fact-based affidavits of Plaintiffs-Appellants' experts.

The allegations of contradictory affidavits are similarly meritless. Specifically, Defendants-Appellees state:

> Moreover, the affidavits cited by Plaintiff contradict each other. As an example, Mr. Dolsky's affidavit of January 16, 2002 . . . states that costs from 1999 to 2000 increased 36.1% for retirees and 8.2% for MPSERS while his affidavit of April 27, 2001 states that such costs increased 41.3% and 22.5%, respectively. (Defendants-Appellees Brief, pp 46-47.)

There is no contradiction here. These numbers are for different items and for different time periods. There is no reason they should be the same. The 41.3% increase for retirees and 22.5% for MPSERS refer to the percentage increases in

medical payments only (that is, not including drug payments) from 1995 to 1999. The 36.1% increase for retirees and 8.2% for MPSERS refer to the percentage increases in medical plus drug payments from 1999 to 2000. There is no contradiction here and both statements from Mr. Dolsky show a trend of shifting more of the costs to retirees over time. Furthermore, neither of the above shows the additional shift of costs to retirees that occurred on January 1, 2001, with the introduction of a 40% retiree co-pay on non-formulary drugs.

As noted in previously-filed Briefs with this Court, there are substantial and genuine issues of material fact which require a trial to resolve.

SUMMARY AND CONCLUSION

The health benefits given to retirees from the MPSERS pursuant to Section 91(1) of the Retirement Act are protected from diminishment or impairment under both Mich Const 1963, art 9, §24 as well as the general non-impairment clauses in the federal and Michigan Constitutions. The grant of these benefits by the Legislature is contractual. It is unthinkable that the Legislature of Michigan induced 140,000 citizens to work for 25 to 30 years under the assumption that they would receive health benefits at retirement only to be told after they retired, and at the most vulnerable point in their life, that the State may strip them of that benefit. The opinions of both the Trial Court and Court of Appeals acknowledged the solemn commitment made by the State in that regard.

We ask this Court to recognize two fundamental truths that are irrefutable and important when interpreting the constitutional provisions involved herein. First is the importance of education to the citizens of our State. Second is the financial vulnerability

of retirees. Both of these truths weighed heavily upon the framers of Mich Const 1963, art 9, §24. Constitutional Convention Delegate Richard VanDusen, the Chief scrivener of art 9, §24, and several other members of the Finance Committee expressly stated that there were two reasons for adding art 9, §24 to the Constitution. The first was to give retirees a degree of security regarding their retirement benefits they had not enjoyed in the past and the second was to make public employers who promised such benefits financially responsible for financing them. The State has not and cannot give any sound reason why those reasons apply to monthly retirement allowances, but not to health benefits from the same retirement system. In many cases, in fact probably most cases, a retiree's health protection is every bit as important to them as their monthly retirement allowance. In the end, the State continues to revert to the argument that because MPSERS did not provide health benefits to retirees in 1963, then art 9, §24 could not possibly protect health benefits. But that argument flies in the face of the history leading up to the Constitutional Convention of 1961, the statements of the drafters of Mich Const 1963, art 9, §24 as to the reasons for adding that provision to the Constitution, the language of art 9, §24, and common sense.

Why would the drafters of art 9, §24 or the voters who approved it have desired to give to public employees a greater degree of security vis-à-vis their monthly retirement allowances, but have wanted to withhold that security as to a benefit every bit as valuable to them as their health insurance? Why would the drafters of art 9, §24 or the voters who approved it have wanted to make public employers fiscally responsible regarding monthly retirement allowances, but not fiscally responsible regarding health benefits? Delegate Richard VanDusen, when explaining the need for art 9, §24 said:

> We believe that this Constitution must be a forward looking document; that it must take cognizance of the problem; that it must spell out for the future the manner in which these funds should be managed, so that our children will not 50 years hence, suffer from the fact that we failed to put in enough money to take care of the benefits attendant upon the service currently performed by public employees. (Official Record of the 1961 Constitutional Convention of the State of Michigan, p 771.)

The State has never explained because it cannot explain why our children 50 years from now should suffer because public employers did not properly fund health benefits. There is no rational explanation for treating those two benefits differently. This is why the drafters chose the very broad, all encompassing language "financial benefits" rather than use the term "pension benefits." They wanted the security to retirees and the fiscal responsibility of public employees to be the same for any type of "financial benefit." The State continues to argue that health benefits are not "financial benefits." We ask this Court to put this absurd argument in the proper frame of reference. At the same time the State argues that health benefits are not financial benefits, they are telling this Court, along with all the Amicus Curiae herein, that if you hold health benefits to be financial benefits, you will cause the State and public employers grave financial problems. At pp 37-38 of their Brief, Defendants-Appellees state:

> If there is no sharing of increases in cost, the cost to MPSERS would become overwhelming. MPSERS receives its funds from schools pursuant to MCL 38.1341. Schools paid over $370 million in 2000 to provide health care benefits to retirees. (Defendants' Appendix 85a.) If this amount is not controlled, funds available for school pupil instruction will be reduced because the tax revenue available to schools is finite.

The Briefs of the Amicus Curiae herein are equally strident in their unproven allegations of financial stress over health benefits. Doesn't that sound strange from advocates who in the same breath argue to the Court that health benefits are not financial benefits? How could non-financial benefits be creating financial problems? This inherent contradiction in the State's and the Amicus Curiae's positions is one they cannot avoid. What they want of this Court is for it to become a super legislature and let them out of their financial responsibilities to the retirees. This the Court should not countenance. It particularly should not be countenanced where, whatever problem there is, and none has been proven in this case, is of the Legislature's making. The Legislature passed the Retirement Act and provided for health benefits for public school retirees. The Legislature by the same token has the power to extricate the State and the school districts from whatever financial problems they have caused. If they do not have the will to do that, why should this Court hold that retirement benefits that cost MPSERS $370,000,000 in 2000 are not financial benefits?

The same basic arguments are applicable to Plaintiffs-Appellants' claims under US Const, art I, §10 and Mich Const 1963, art 1, §10. The legal analysis of these claims under the general non-impairment clauses is straightforward and is not contested herein.

Where the Trial Court made a grave error was in making factual findings based on affidavits from MPSERS which MPSERS, for the first time in the Court of Appeals, admitted were grossly inaccurate. The Court of Appeals erred by not recognizing the importance of the State's inaccurate data and concluding that the contractual impairment was not significant. Plaintiffs-Appellants' expert actuaries concluded that

the State's increased co-pays and deductibles amounted to a significant impairment because it amounted to a substantial shift of the relative burden of paying for the health care plan from the State to the retirees.

By contrast, the State's argument was based upon flawed data. We ask this Court to accept our actuaries' opinions as sound and hold that the State's actions in increasing the co-pays and deductibles amounted to a significant impairment of the retirees' contractual rights. We do not ask for a declaratory judgment that they cannot raise co-pays or deductibles, only that the increase in co-pays and deductibles must be shared on the same percentage basis as historically paid by the respective parties. If this Court feels it lacks the facts to make such a determination based on the documents before it, we ask the Court to remand the case to the Ingham County Circuit Court so that a trial may be conducted to ascertain the facts upon which the Court may make a proper decision.

Respectfully submitted,

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